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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 189

ROBERT W. MORRIS,
Appellant,

vs.

FORD MOTOR COMPANY,
Appellee

Appeal from The Supreme Court of the State of Michigan

BRIEF IN SUPPORT OF MOTION TO DISMISS

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Interstate Brief & Record Co., 170 East Lamed St., Detroit 26, Michigan

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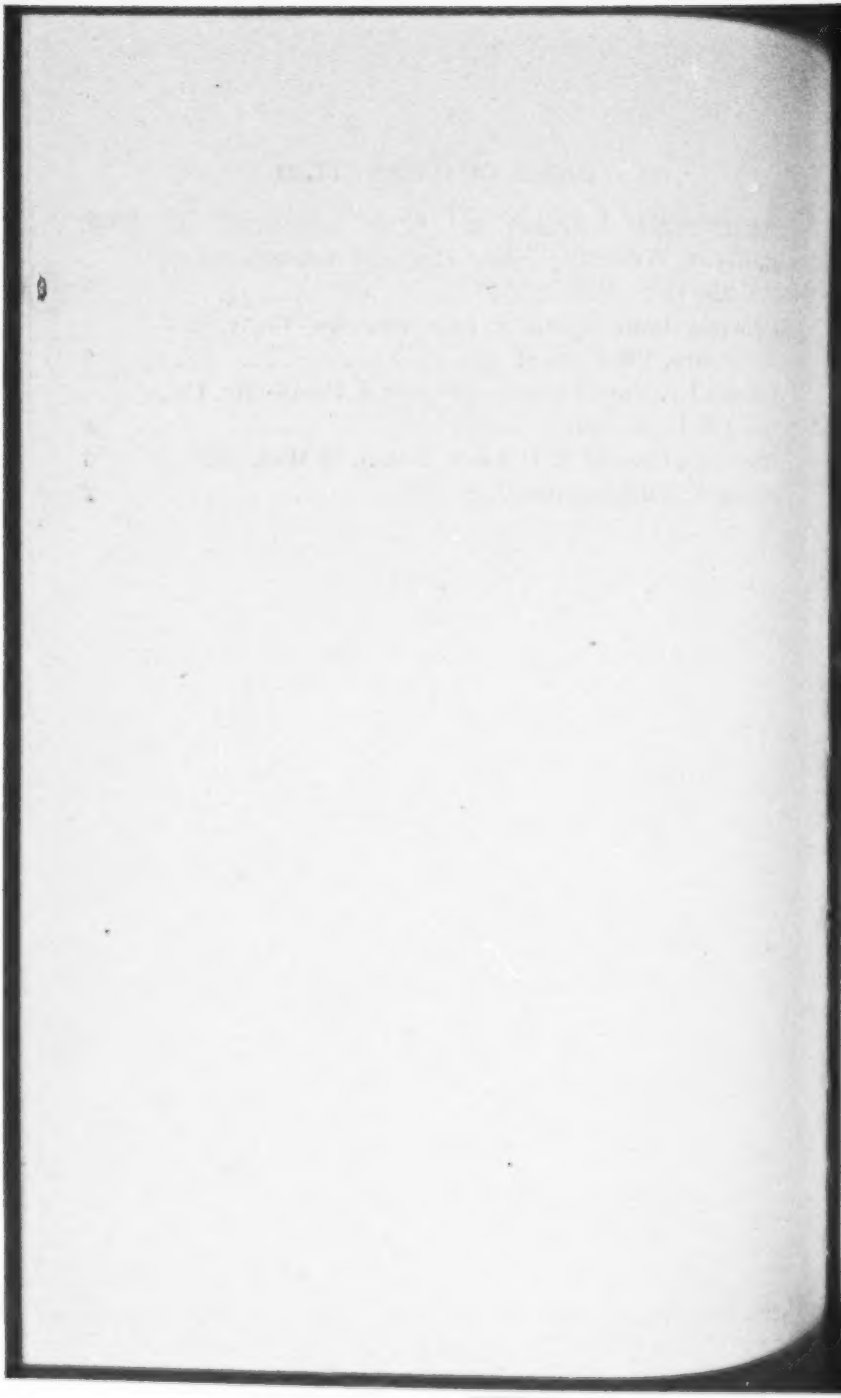

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I.

APPELLANT HAD AMPLE OPPORTUNITY TO RAISE THE FEDERAL QUESTION IN THE TRIAL COURT

Appellant contends he raised the Federal question at the first opportunity. This is not true. If any Federal

question is involved in this litigation at all it necessarily arose when appellee filed its Motion to Quash the Declaration and Dismiss Case in the trial court. That motion was based in part upon the very same grounds upon which the Supreme Court of Michigan based its decision which is now appealed from. (State Court Record, pp. 4-5). If those grounds gave rise to questions under the Constitution of the United States they should have been called to the attention of the trial court, which they were not.

Chicago, Indianapolis and Louisville Ry. Co. v. McGuire, 196 U. S. 128, 131 (1905).

II.

IT DOES NOT AFFIRMATIVELY APPEAR ON THIS RECORD THAT THE MICHIGAN SUPREME COURT PASSED UPON THE FEDERAL QUESTION

This Court will not infer that Federal questions were passed upon by lower courts. Unless decision of some Federal question affirmatively appears upon the record brought here for review on appeal this court is without jurisdiction.

Bailey v. Anderson, State Highway Commissioner, 326 U. S. 203, 207 (1945).

Appellant contends he raised the Federal question twice in the State courts, both times in the Supreme Court. These occasions were: (1) in his reply brief, and (2) in his Motion for Rehearing.

As to the first occasion, it is sufficient to point out that it is the established rule that briefs filed in the state courts form no part of the state court record for the purpose of review by this Court.

Zadig v. Baldwin, 166 U. S. 485, 488 (1897).

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The question was raised in the Motion for Rehearing in the Supreme Court of Michigan, which is a part of the state court record. But the Motion for Rehearing was denied without opinion. Under such circumstances this court will infer that the question failed of decision in the state court because of its untimely presentation there.

Bailey v. Anderson, State Highway Commissioners, supra;
Chicago, Indianapolis & Louisville Ry. Co. v. McGuire, supra.

In the latter case, this Court said:

> "If the Supreme Court did in fact consider the Federal question the burden was upon the plaintiff to show it. There is no presumption that the court considered such question. Under such circumstances we decline to review the constitutional question here." 196 U. S. 128, 132.

III.

THE DECISION OF THE SUPREME COURT OF MICHIGAN WAS BASED SQUARELY UPON THE GROUND THAT APPELLANT COULD NOT SUE AT LAW UPON A THEORY INCONSISTENT WITH HIS POSITION TAKEN BEFORE THE COMPENSATION COMMISSION. THIS IS PURELY A QUESTION OF STATE LAW AND IS ADEQUATE TO SUPPORT THE STATE COURT DECISION

In our Statement Opposing Jurisdiction we made this argument (p. 3) which appeared so obviously sound as to require no citation of authority to support it. Appellant now calls this a "bald conclusion." This necessitates a reply.

That the Supreme Court of Michigan squarely held as stated above appears clearly from its opinion:

> 'Plaintiffs proceeded before the compensation commission on the theory that his injury arose out of and in the course of his employment, but, now, in an action at law, proceeds on the theory that it did not so arise. Having adopted one theory before the compensation commission, he may not thereafter bring other proceedings based upon an inconsistent, opposite theory or claim."

(Statement as to Jurisdiction, p. 21.)

This Court has held that a decision which applies the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings is based upon a non-federal ground adequate to support it.

> *Leonard v. Vicksburg, Shreveport & Pacific RR. Co.*, 198 U. S. 416 (1905).

In that case this Court said:

> "In the present case, the Supreme Court of Louisiana applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings.
>
> "• • • That was a question of estoppel or quasi-estoppel and not a Federal question. Whether it was sound or not, it is not for us to inquire. It was broad enough to support the judgment without reference to any Federal question."
>
> 198 U. S. 416, at 423.

The same rule is applicable here. This court is not concerned with any Federal question because the non-federal ground of estoppel or quasi-estoppel is clearly adequate to support the decision of the Supreme Court of Michigan.

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IV.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Appellant makes the illogical argument that because we conceded there might possibly have been a substantial Federal question if he had appealed from the adverse decision of the Compensation Commission we have therefore admitted there is now a substantial Federal question. The fact is he did not appeal from the Compensation Commission, and under Michigan law this failure to appeal bars recovery at law under the decisions cited in our Statement Opposing Jurisdiction (p. 3). That this is purely a question of state law wholly devoid of any substantial Federal question is apparent from the decision of this Court in *Leonard v. Vicksburg, Shreveport & Pacific RR. Co., supra.*

The gist of appellant's argument of unconstitutionality apparently is that the Workmen's Compensation Act of Michigan as construed by the Michigan Supreme Court sets aside a common law remedy without providing an adequate substitute. (Statement as to Jurisdiction, pp. 12-16). But on the facts on which he relies there was no common law remedy against the employer because the injury was caused by the negligence of a fellow servant—the nurse in the First Aid Station.

At common law the fellow servant rule was followed in Michigan, whether the employer was a corporation or an individual.

> *The Michigan Central RR. Co. v. Dolan*, 32 Mich. 509 (1875).

Surely the legislature of Michigan was not required by the Constitution of the United States to furnish a statutory remedy to the employee against the employer when none existed at common law.

CONCLUSION

For the reasons stated in its Statement Opposing Jurisdiction and in the foregoing brief Appellee prays that its Motion to Dismiss be granted.

Respectfully submitted,

CLAYTON C. PURDY,
FREDERIC S. GLOVER, JR.,
Counsel for Appellee.

Dated: September 10, 1948.